[Editor's note: The judgments of His Lordship Mahadev Shankar JCA in Arah Cipta Sdn. Bhd. & Anor. v. Kian Kee Sawmills (M) Sdn. Bhd. & Ors. (No. 1) [1997] 2 CLJ 400 and Arah Cipta Sdn. Bhd. & Anor. v. Kian Kee Sawmills (M) Sdn. Bhd. & Ors. (No. 2) [1997] 2 CLJ 406 were received in May 1997.

ARAH CIPTA SDN. BHD. & ANOR.

v.

KIAN KEE SAWMILLS (M) SDN. BHD. & ORS. (NO. 1)

COURT OF APPEAL, KUALA LUMPUR
SHAIK DAUD ISMAIL JCA
MAHADEV SHANKAR JCA
ABU MANSOR ALI JCA
[CIVIL APPEAL NO: W-02-407-95]
2 SEPTEMBER 1996

JUDGMENT

Mahadev Shankar JCA:

This matter concerns an action filed by the appellant/plaintiffs to enforce an agreement for the sale of land. The learned trial Judge struck it out on the ground that the statement of claim did not disclose a cause of action against the first defendant and that the other defendants had all been unnecessarily dragged into a dispute with which they were in no way legally involved. We allowed the appeal and directed that there should be an early trial. Our decision was unanimous. As will soon be apparent this was not such a plain and obvious case which merited the sudden death verdict which the defendants' Counsel persuaded the trial Judge to inflict upon the plaintiffs.

The first defendant ('the vendor') is the registered owner of 25 plus acres in Ulu Klang ('the said land'). It was ripe for development. The third defendant (Datin Chong) is in sole control of the vendor and has been described as the vendor's alter ego. Kian Kee Sawmills (M) Sdn. Bhd. is therefore just the corporate veil behind which she operates.

In November 1984 the vendor charged the said land to the second defendant ('the bank') for a loan of RM7 million to one Ong Chin Seong and Shee Koon Ruay (Loan 337). In April 1985 the vendor again charged the land to the bank for a loan of RM11 million to Datin Chong (Loan 365). These were third party charges ('the said charges'). The borrowers had therefore a personal liability to repay these loans to the bank. In addition the bank had recourse to the

persons who had agreed to act as their guarantors. The vendor's liability to the bank was thus a collateral one restricted to the market value of the said land. Another encumbrance on the said land was a caveat (the said caveat) lodged by Dato' Haji Wan Mahmood Pawan Teh on 27 November 1992.

In May 1994 the personalities in control of vendor and the first plaintiff ('the purchaser') reached an agreement in principle whereby the said land would be sold by the vendor to the purchaser under an arrangement whereby in return for a fixed sum to be paid by the purchaser the Bank would discharge the two charges and agree to the said land being transferred to the purchaser free of the said charges. Other arrangements were to be made whereby the balance of Loan 337 and 365, over and above the fixed sum, would be settled as between the borrowers and guarantors on the one hand and the bank on the other.

The vendor also undertook to have the said caveat removed at its own expense. The purchaser's profit in this exercise was to come from the sale of the completed residential housing units to be developed on the said land. The vendor's gain after the completion of this exercise was RM3.9 million of housing units plus a payment up front of RM100,000 in cash after the bank's requirements had been finalised. The success of this scheme depended upon the cooperation of all the parties involved.

These intentions were fleshed out into legal obligations in a formal sale & purchase agreement (the sale agreement) in writing dated 2 June 1994. The purchase price was RM17 million. It was conditional upon Foreign Investment Committee (F.I.C.) approval being obtained and upon the Bank's consent and confirmation that the amount the bank agreed to accept to redeem the said charges would not exceed the purchase price. The bank was to indicate this in a document described as "the Redemption Confirmation". The purchase price was to be paid in one lump sum to the vendor's solicitors before 2 December 1994 or one month after the receipt of the F.I.C. approval whichever was the later (the completion date).

On 2 June 1994 the vendor and the purchaser also entered into a supplemental agreement (the supplemental agreement). This was to provide the vendor with the means to discharge the said caveat. Under it the purchaser had to pay as an additional purchase price RM4 million in the following manner. RM100,000 was to be paid to the vendor's solicitors as stakeholder upon execution of the supplemental agreement **and** subject to the redemption confirmation. RM3.9 million was to be paid in kind in the form of residential housing units when completed on the said land.

The sale agreement and supplemental agreement required the fulfillment of reciprocal promises by all the parties involved. The borrowers had earlier appointed the purchaser to negotiate the quantification of the said charges. By letter dated 11 May 1994 the purchaser proposed to the Bank that this should be RM16 million. The borrowers, guarantors and Datin Chong signified to the bank their consent to the terms of sale agreement by a letter dated 31 May 1994. On 16 May 1994 and 2 June 1994 vendor passed the required resolutions approving the sale and the supplemental agreements. The borrowers and guarantors also signed a written authority dated 31 May 1994 addressed to the Bank in which they stated as follows:

> We, the undersigned hereby consent to the aforesaid sale and hereby authorise Arah Cipta Sdn. Bhd. to deal negotiate and conclude with you (the Bank) on all matters relating to the determination of the final redemption sum due and payable to the Bank in full and final settlement of the loan accounts under Datin Chong Seee Yeow, Shee Koon Ruay and Ong Chin Seong.

On 20 June 1994 the bank wrote a letter to the purchaser indicating its willingness to consider accepting RM16 million as the redemption sum for the said charges, subject to a revaluation of the said land. The same day the Bank wrote to the borrowers that it was not prepared to accept RM16 million in full settlement of the said loans. Thus the personal liability of the borrowers was to continue.

The subsequent bank evaluation showed that the RM16 million was in excess of the market valued of the said land as did an independent evaluation by the vendor. The redemption sum was then renegotiated by the purchaser and vendor and reduced to RM15 million. RM2 million being the balance of the purchase price was agreed to be retained by the vendor's solicitors M/s. Lim Soh Wah & Co. to account of conversion premium fees.

At this point the purchaser gave formal written notice to the vendor that it had assigned its rights under the sales agreement to the second plaintiff, Dual Three (M) Sdn. Bhd (the Assignee). The vendor acquiesced in the notice of assignment but did not formally indicate its consent thereto. This assignment was therefore an equitable assignment requiring any action to be brought in both names. It is to be noted that cl. 29.1(e) of the sale agreement specifically included the purchaser and its assigns.

By a letter dated 27 October 1994 addressed to the borrowers the bank agreed to accept RM15 million as the redemption sum for the said charges upon terms to be consented to by the borrowers. The F.I.C. approval was obtained on 14 November 1994. Accordingly the purchaser contended that the completion date for the sale agreement was fixed for the l3 December 1994.

By a letter dated 23 November 1994 the purchaser's solicitors gave notice to the vendor's solicitors of its agreement to the bank's letter to the borrowers dated 27 October 1994 referred to earlier and also gave notice of its intention to implement the supplemental agreement by paying the RM100,000 required thereunder.

The vendor's response by letter dated 2 December 1994 was to contend that the sale agreement had lapsed. The purchaser's solicitors replied the same day refuting this and contended the sale agreement was open for performance.

The following day the vendor's solicitors terminated the sale agreement contending that the Bank's Redemption Statement did not fulfill the borrowers' requirements because payment of the RM15 million would not extinguish the personal liability of the borrowers for the said loans.

The purchaser's solicitors challenged this by letters dated 16 December 1994 and 20 December 1994 gave notice of its intention to claim specific performance of the sale agreement and filed this action on 24 March 1985.

The purchaser's solicitors followed up on 10 April 1995 with:

(1) An application for an injunction to prevent the release of the title deed to the said land by the Bank;

(2) An application for summary judgment.

On 18 April 1995 the vendor, Datin Chong and the fourth defendant filed an application to strike out this action. On 26 April 1995 Tan & Tan Development Sdn. Bhd., the fifth defendant and sixth defendant also filed an application to strike out the action. The bank filed its application to strike on 2 May 1995. These applications were all supported by affidavit evidence since they were made under all limbs of O. 18 r. 19(1) and O. 92 r. 4 of the Rules of the High Court. Affidavits were also filed in opposition by the purchaser's solicitors.

This is a convenient point to consider the activities of Datin Chong and the vendor between the 2 June 1994 when the sale agreement and the supplemental agreement were signed, and the 3 December 1994 when the vendor's solicitors repudiated the sale agreement. The purchaser's solicitors had no contemporaneous knowledge of these activities which only came to light after the repudiation and the discovery of certain other caveats filed against the said land.

The fifth defendant (Tan & Tan) filed its caveat on 25 November 1994, well before the vendor's solicitors repudiated the sale agreement on 3 December 1994. The sixth defendant which is an associate company of Tan & Tan filed

its caveat on 19 December 1994. The purchaser asserted that about October 1994 when the parties were still putting through the requirements of the sale agreement, the vendor and Datin Chong entered into an arrangement with the fourth defendant (Bonanza), Tan & Tan and the sixth defendant (Harta) to sell the said land to them. The purchaser's solicitors pleaded that what was done in breach of the vendor's warranties and covenants which were spelt out in cl. 20.1(g) of the sale agreement. It reads as follows:

> (g) that it shall not hereafter mortgage, charge, transfer, sell convey or otherwise deal with the said Property so as to encumber, encroach upon or divest the purchaser of its rights, title and interest to the said Property;

At the time of the filing of the statement of claim, owing to a lack of knowledge of the full circumstances of Datin Chong's role in this matter, the plaintiffs thought that subsequent to the bank's letter dated 27 October 1994 all the borrowers agreed to the bank's terms except Datin Chong who declined to give formal consent even though she was obliged to do so under the terms express or implied of the sale agreement. Paragraph 16 of the statement of claim was pleaded accordingly and the plaintiffs took the line that in law she could be compelled to consent. By the time of the hearing on 5 June 1995 the factual position had become quite clear from the affidavits before the Court. It was only in the course of the proceedings on that day, midstream as it were, the defendants chose to elect to proceed on the basis of O. 18 r. 19(1)(a) alone. Tactically they may have thought that this would have given them the advantage of shutting out the adverse material contained in these affidavits. One point especially requires emphasis. The plaintiffs' Counsel submitted that there was clear evidence before the Court that contrary to what was pleaded in para. 16 of the claim, Datin Chong had in fact consented to the bank's letter of 27 October 1994, and para. 16 would be amended accordingly. He referred the Court to the relevant passage in the White Book.

The relevant words in O. 18 r. 19(a) are:

> The Court **may** ... order to be struck out **or amended** any pleading ... on the ground that:
>
> (a) it discloses no reasonable cause of action ...

The practice which should be followed in such cases is stated in *The Supreme Court Practice 1995* at para. 18/19/3:

> Indeed, the Court will generally give leave to amend a defect in pleading rather than give judgment in ignorance of faces which ought to be known before rights are definitely decided.

None of the defendants challenged the assertion that Datin Chong had in fact consented to the bank's letter. Justice therefore requires that the trial Judge deem that para. 16 had been amended and proceed to consider whether on an overview of the whole claim the defendant's contention was not devoid of merit.

When the vendor's solicitors did not respond to the purchaser's solicitors letter dated 23 November 1994 proposing the payments required to complete performance of the purchaser's covenants, the purchaser's solicitors' sent a reminder on 1 December 1994. By cl. 4.1 of the sale agreement the completion date had been extended by a further month to the 2 January 1995.

On the basis that Datin Chong had also consented to the bank's terms in its letter dated 27 October 1994, the vendor's solicitors' letter dated 2 December 1994 constituted a serious departure from acceptable standards of professional practice which merited an appropriate inquiry by the Court into its full legal implications both on the enforceability of this contract and on its other aspects.

The fact that Datin Chong consented to the redemption letter is brought out by her copy of the said letter which was referred to in para. 12 of her first affidavit filed in this civil suit affirmed on 18 April 1995. The letter is marked exh. DC.7. It shows her signature along with the other borrowers. It also shows the bank's chop by way of proof that the bank received the consent of all the borrowers on 7 November 1994. Since M/s. Lim Soh Wah & Partners (Lim) were the solicitors both for the vendor and Datin Chong the inference is irresistible that Lim knew of this. Lim's letters of 2 and 3 December 1994 when he repudiated liability cannot be reconciled with this knowledge which the purchaser contends he wilfully suppressed in order to fabricate an excuse for the repudiation.

Clause 2 of the sale agreement is headed **Condition Precedent**. It reads as follows:

> 1. It is hereby expressly agreed between the parties hereto that this agreement and the sale and purchase herein contemplated is subject to and conditional upon:
>
> (a) the approval of the Foreign Investment Committee of Malaysia (hereinafter referred to as 'FIC approval') to the sale and purchase hereunder of the said Property; and
>
> (b) the receipt of the consent from the chargee to the sale hereunder together with their confirmation that the redemption amount shall not exceed the purchase price.

The F.I.C. approval was obtained on 14 November 1994. The bank's terms for consent to the sale together with its confirmation had been made known by its letter dated 27 October 1994. The purchasers were therefore entitled to contend that both conditions had been fulfilled and the vendor's solicitors had no business to contend otherwise as they did in their letter dated 2 December 1994.

Datin Chong was the alter ego of the vendor. The power of attorney given by the vendor to the purchaser authorised the purchaser to negotiate the redemption sum to clear the said charges. This the purchaser says it successfully completed with the bank's letter dated 27 October 1994. Datin Chong in her personal capacity was also a borrower. The bank required her consent to these arrangements and the plaintiffs' assertion was that she had given it. Accordingly it was not open to the vendor to repudiate the sale agreement on 3 December 1994 on the ground that redemption sum was only going to be accepted as consideration for vacating the said charges and not also in full satisfaction of the outstanding loans to the borrowers. *Keet G.F.N. John v. Mohd. Noor* [1995] 1 AMR 373 is ample authority in support of the purchaser's right to bring her to account.

The facts of this case as pleaded with the proposed amendment could not be controverted because the vendor's solicitors were relying on a non-event (i.e. the Bank's alleged absence of consent) when the reverse was the truth. In any event even if Datin Chong had refused to give consent the contention was that she should not be allowed to rely on her own default to frustrate the agreement. So even if unamended the statement of claim raised triable issues.

But with the proposed amendment in place the effect was to complete total fulfilment of cl. 2.1(b). The relevant words are "subject to and conditional upon:

> (b) the receipt of the consent from the charges ...

The clause does not identify the recipient. Since the bank elected to correspond on this matter onIy with the borrowers and the vendor they must be held to be recipients. The bank's consent was contingent upon the consent of the borrowers. Once the borrowers and Datin Chong had signed, the fulfillment of cl. 2.1(b) became a reality i.e. on 7 November 1994. With the F.I.C. approval on 14 November 1994 both conditions had been fulfilled to the knowledge of the vendor. I regret to say that unrebutted, the only conclusion possible is that Lim's letter of 3 December 1994 was a lie.

In his judgment the learned Judge stated there were three conditions agreed between the parties. In fact there were only two conditions precedent in the sale agreement i.e. the F.I.C. approval and the bank's consent to the sale

with the confirmation that the redemption amount to discharge the said charges should not exceed the sale price. The payment of the RM100,000 cannot be treated as a condition precedent. It was never described as such. It was provided for in the supplemental agreement as "part payment of the additional purchase price" to the vendor's solicitors "as stakeholders upon execution of this agreement **and subject** to the receipt of the consent" to the sale agreement from the bank. No time limit has been stipulated in the supplemental agreement as to when the consent should have been forthcoming. Even before the bank's letter was obtained, the purchaser's solicitors had tendered this RM100,000 to the vendor's solicitors by letter dated 14 September 1994 but the vendor's solicitors did not accept it. In any case it was never the vendor's solicitors' stand that they had repudiated the agreement for non-payment of this RM100,000. The repudiation on 3 December was based on the contention that the second condition precedent in cl. 2(1)(a) had not been fulfilled.

Relying on *Aberfoyle Plantations Ltd. v. Khaw Bian Cheng* [1960] 26 MLJ, the vendor's Counsel persuaded the learned trial Judge to hold that:

> ... until the conditions are fulfilled there can be no contract there is no cause of action, and the whole case collapses not only against the first defendant but against all the defendants...

On the facts of this case it was highly arguable (and I need not put it any higher than that) that the sale agreement was not that kind of contract at all because it imposed mutual obligations on both parties by way of reciprocal promises and each party was required to use its best endeavours to assist the other party to ensure that the two hurdles in question were surmounted. Even if para. 16 of the claim was taken in its original state the law stated in Kim Lewison on the *Interpretation of Contracts* at p. 145 is:

> Where a contract is conditional, it is often implied that neither party will do anything to prevent fulfillment of the condition, and is sometimes implied that one of the parties will do his best to see that the condition is fulfilled.

National Land Finance Co-operative Society Ltd. v. Sharidal Sdn. Bhd. [1983] 2 MLJ is a Federal Court decision by which we are bound, and it is very much in point. As stated by YAA Salleh Abas at p. 218:

> ... neither the respondents nor the appellants could resile from it until it could definitely be ascertained that the condition could not be fulfilled.

The description condition precedent in cl. 2 was equivalent to the contingent condition referred to in s. 33(a) of the Contracts Act and it was quite erroneous to suggest that there was no contract. Here there was a binding contract which was in no way dependent on the fulfillment of the two conditions which the

parties had both agreed to bring about if at all possible. Only the performance of the vendor's obligation to sell and the purchaser's obligation to make the required payments were dependent on the fulfillment of the two contingencies. (See *Chi Liung Holdings Sdn. Bhd. v. Attorney-General* [1994] 2 SCR (Headnote 1). As s. 33(b) of our Contracts Act provides, "If the event becomes impossible, such contracts become void."

Far from becoming impossible the plaintiffs' case was that by the 27 October 1994 and the 14 November 1994 both contingencies had been overcome and the liabilities of both vendor and seller were no longer inchoate. In other words the contract was not null and void but available for performance. Section 52 of the Contracts Act 1950 thus came into play and one party was not bound to perform unless the reciprocal promisee was ready and willing to perform.

The position taken by the other defendants apart from the vendor was that because they were not parties to the sale agreement, the purchaser had no cause of action against them. So the trial Judge was persuaded to hold as follows:

> In any event even if there is an extant contract between the first plaintiff and the first defendant I fail to see how the five others could have been dragged in as defendants when they were not even parties to the contract entered into between the first plaintiff and the first defendant. It has to be noted that no relief was prayed for against the second, third and fourth defendants on the sale agreement. A prayer was requested for the removal of caveats lodged against the land by the fifth and sixth defendants but no nexus is shown between these two defendants and the agreement entered into between the first plaintiff and the first defendant. I fail to see how the second plaintiff can figure in the litigation as well since he too was not a party to the contract. Naraynan says the second plaintiff was nominated as recipient transferee of the said land and he points to para. 15(c) of the SC but, with respect, that pleading does not so state.

With respect we think this was too narrow a view to take in all the circumstances of the case. The real question is whether these defendants were proper parties to the action. This claim was for specific performance of the contract for the transfer of the land to the purchaser. The bank had to be brought in because it was a chargee who had to be paid off and its consent was required for the sale. The other defendants were all involved in the steps taken by Datin Chong to resile from the sale agreement and to create an adverse claim to the land which they had sought to protect by filing caveats against it. If the plaintiffs were to succeed to obtain specific performance these people had to be made bound by the order so that the purchaser could get clear title. Besides as against all of them there was also a claim for damages for unlawful interference.

The relevant legal provisions requiring such other parties to be joined as defendants are ss. 17 and 19 of the Specific Relief Act 1950. *The Sale and Purchase of Real Property in Malaysia (1984)* by Visu Sinnadurai at p. 131, O. 15 r. 6 of the Rules of the High Court 1980 and Re *B.S.B. Holdings Ltd.* [1992] BCC 915. We do not need to analyse these authorities in depth here.

Quite correctly the learned trial Judge referred to *Mooney & Ors. v. Peat Marwick Mitchell & Co. & Anor.* [1967] 1 MLJ 89 but the misdirection occurred when he was persuaded to hold that there was no contract in existence here until the condiditions are fulfilled and therefore no cause of action. Had the matter been viewed in the correct perspective he should have held that there was a contract here which the plaintiffs were entitled to enforce if the two conditions had been fulfilled. The plaintiffs asserted they had been and they were entitled to enforce their rights. The defendants denied that the second condition had been fulfilled and that was eminently an issue to be tried because there was material before the Court that it was fulfilled and that in any event, if it was not, that situation was brought about by default of the first and third defendants. Putting it at its very lowest for the plaintiffs there were very serious questions to be tried here and the trial Judge should have given leave to amend and directed the action to proceed.

We ordered an early trial because very large sums of money are involved here and any undue delay can result in a dilution of the rights of the parties. We also ordered the costs of this appeal and in the Court below to be taxed and paid by the respondents to the appellants.

In conclusion it should not be overlooked that the vendor's application to strike out was not only on the basis of O. 18 r. 19 but also O. 92 r. 3 of the Rules of High Court. The inherent jurisdiction of the Court thus invoked obliged the Court to prevent an injustice to the plaintiff. This judgment is interlinked with the judgment I have written in W-02-646-95 which should be read along with this.